

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

GEORGIA A. NETHERLAND

Claimant

V.

**MIDWEST HOMESTEAD OF OLATHE
OPERATIONS LLC**

Respondent

AND

TRAVELERS INDEMNITY CO. OF AMERICA

Insurance Carrier

Docket No. 1,073,038

ORDER

Respondent and its insurance carrier requests review of the July 9, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Steven J. Howard.

APPEARANCES

James E. Martin, of Overland Park, Kansas, appeared for the claimant. William L. Townsley, III, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from July 7, 2015, with exhibits attached; Claimant's Discovery Deposition from May 5, 2015, and the documents of record filed with the Division.

ISSUES

The ALJ found claimant's accident and injury arose out of and in the course of her employment with respondent and the fall was the prevailing factor leading to her injuries and the need for medical treatment for claimant's right hip and left shoulder. He awarded temporary total disability compensation commencing May 28, 2015, at \$392.58 per week until released to substantial and gainful employment. Respondent was ordered to provide the names of two qualified specialists to treat claimant's left shoulder and right hip.

Respondent appeals, requesting review of whether the injury arose out of and in the course of claimant's employment with respondent. Respondent contends the accident occurred as the result of an idiopathic fall or as a personal or neutral risk not related to claimant's work. Respondent further denies the accident was the prevailing factor for any alleged injury to claimant's left shoulder, therefore the Order should be reversed.

Claimant contends the ALJ's Order should be sustained in all respects as she has sustained her burden in proving the accidental injury to her right hip and left shoulder arose out of and in the course of her employment with respondent.

FINDINGS OF FACT

Claimant began working for respondent in January 2006 as a cook. On December 20, 2014, claimant completed a ten-hour shift and was walking through the dining room on her way to clock out when she turned around to speak to a co-worker, Erlinda Ilacad, who had inquired about leftover food from lunch. When she did, Erlinda was in such close proximity to her (face to face), claimant was startled and started to back up and fell. Claimant testified she tried to grab Erlinda's shoulder but was only able to brush the co-workers shoulder as she fell. There was nothing on the floor to cause her fall. She was simply startled and fell. Claimant alleges she injured her right hip and left shoulder in the fall. Erlinda, testified that she felt someone grab at her shoulder just before claimant fell.

Claimant denied any prior injuries to her right hip or left shoulder. Claimant testified her primary physician, Denny Thomas, M.D., told her she possibly had a tear (unspecified area) as a result of the fall. However, Dr. Thomas' medical records contemporaneous with the fall fail to mention claimant's shoulder. Claimant admits to prior work injuries to her right arm, right elbow, right foot, left leg and left hand.

Claimant testified she knew she was hurt after she fell because she had pain in her right hip and could not get up. Claimant's co-workers went to get the on duty nurse and main nurse and claimant was sent to the hospital via ambulance. Claimant does not remember EMS being called. The Pre-hospital Care Report from Med-Act gave a history of claimant "walking in the kitchen of her work when she "tripped over (her) own feet" and fell, landing on her right hip."¹ The Olathe Medical Center, Inc., medical report of December 20, 2014, also recorded a history of claimant having "tripped over my own feet". That report also indicates claimant's feet became tangled with a co-worker, causing her to

¹ P.H. Trans., Resp. Ex. A Section 1 at 2.

fall.² Claimant denies she blacked out, as reported by a witness and co-worker, Michele Blanchett.³

Claimant was examined and diagnosed with a fractured right hip. The next day she had surgery with Dr. Hurst to replace a shattered hip ball. Claimant was in the hospital for four days and then went to Hoeger House, a rehabilitation facility, for 31 days. Once claimant was released from Hoeger House, she went home and then attended rehabilitation appointments at Johnson County Rehab twice a week. Claimant showed some improvement with rehab, but was required to use a walker for a while. She testified she has been without the walker since February 2015. Claimant now uses a cane, but is not steady on her feet.

Claimant continues to have pain and soreness in her hip. She indicated her hip bothers her with every step she takes and when she gets up and sits down. Claimant indicated her pain was constant with it being worse in the morning, at a 12 on a scale of 0 to 10.

There was no mention of claimant's left shoulder issues in her medical records as the focus was on her hip. She indicated she received therapy for the shoulder at the rehabilitation facility, but there are no records of this treatment. Claimant has limited range of motion in her shoulder and has pain at a 9 out of 10.

Claimant met with Edward J. Prostic, M.D., for an examination on April 20, 2015, with complaints of frequent pain in the right hip laterally, difficulty lying on her right side, difficulty initiating walking, an inability to stand for more than short times or walk more than short distances. She has a limp and is unable to squat or kneel. She is reluctant to do stairs. Dr. Prostic noted claimant walked slowly with an antalgic gait.

Dr. Prostic examined claimant's right hip and found alignment to be satisfactory, the right leg was three quarters of an inch shorter than the left leg and the right thigh three quarters of an inch smaller in circumference than the left, four inches above the superior pole of the patella. There was severe tenderness of the greater trochanter. Claimant was able to walk a few strides on her toes and on her heels but was reluctant to squat.

Ultimately, Dr. Prostic opined claimant sustained a femoral neck fracture of her right hip and had considerable difficulty from trochanteric bursitis and post-traumatic hip arthritis. Dr. Prostic suggested a corticosteroid injection to the trochanteric bursa and strength and stretching exercises for the iliotibial band. He cautioned if these treatments did not work, total hip replacement arthroplasty would be next. Dr. Prostic opined that, at the time of this

² *Id.*, Resp. Ex. A Section 2 at 1.

³ *Id.*, Resp. Ex. A Section 7.

visit, claimant did not have sufficient ability to stand or walk to return to her previous occupation as a cook. In his April 20, 2015, report, Dr. Prostic stated, the injury sustained on or about December 20, 2014, was the prevailing factor in the injury, the medical condition and the need for medial treatment. Dr. Prostic's report does not mention claimant's left shoulder.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2014 Supp. 44-501b(b)(c) states:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2014 Supp. 44-508(d) states:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2014 Supp. 44-508(f)(1)(3)(A) states:

(f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

- (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
- (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
- (iii) accident or injury which arose out of a risk personal to the worker; or
- (iv) accident or injury which arose either directly or indirectly from idiopathic causes.

K.S.A. 2014 Supp. 44-508(g) states:

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

There is little dispute as to why claimant fell in this instance. The only conflicting testimony comes from a coworker who thought claimant may have passed out. However, that description of the fall has no support outside of Ms. Blanchett's testimony. All other descriptions of the fall indicate claimant was conscious when she fell.

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."⁴

Claimant's description of the accident indicates she turned to answer a question regarding food that had been left over from an earlier meal prepared for the residents of respondent's facility. Because of the close proximity of the co-worker, claimant was startled when she turned, causing her to step back suddenly, leading to the fall. The Employee Incident Report, prepared by respondent, states claimant turned around to answer a question from a CNA⁵. Respondent contends claimant was not engaged in a work task when she turned. This Board Member disagrees. The question to claimant pertained to leftover food, originally prepared for residents of respondent's facility. The ultimate use or disposal of that food would be a work-related decision.

Evidence in the record also indicates that, as claimant was turning, she either tripped over her own feet, or her feet became tangled with a co-workers legs. None of the above possible causes of claimant's fall would be considered idiopathic, or unexplained. All of the scenarios would result from claimant being asked a work-related question, which caused her to turn, leading to the fall. This Board Member finds all possible explanations

⁴ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

⁵ P.H. Trans., Ex. 3.

to be equally work-related. The Order of the ALJ finding claimant's fall arose out of and in the course of her employment with respondent is affirmed as to the hip injury.

Respondent contends claimant failed to prove her left shoulder problems stem from the fall on December 20, 2014. Claimant testified she had no shoulder problems prior to the fall. After the fall, claimant had to have her hair cut short because she was unable to raise her left hand to brush her hair. Claimant rated her post-injury left shoulder pain at 9 on a 1-10 scale. Claimant admits not being aware of significant shoulder pain at and shortly after the fall. She was in significant pain in her hip, which apparently overshadowed the shoulder pain.

However, the record does not support a finding that claimant injured her left shoulder from this fall. There is no indication claimant received medical treatment for the shoulder. None of the records, work generated or medical, contain discussion of claimant's shoulder. The Olathe Medical Center records limit the discussion and treatment to the hip. Even the April 20, 2015, medical report of Dr. Prostic mentions only the hip. His examination of claimant appears to have been limited to the hip.

It is claimant's burden to prove she suffered an injury by accident which arose out of and in the course of her employment with respondent. The ALJ awarded claimant medical treatment for both the hip and left shoulder. This Board Member finds claimant has failed to prove the accident was the prevailing factor leading to claimant's left shoulder problems. The Order of the ALJ on this issue is reversed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed with regard to the accident on December 20, 2014, as it relates to claimant's hip injury, but reversed with regard to the claimed left shoulder injury. Claimant has satisfied her burden of proving the fall on December 20, 2014, arose out of and in the course of her employment, and led to the injury and resulting need for treatment to her right hip. Claimant has failed to prove a connection between the fall and her claimed left shoulder injuries.

⁶ K.S.A. 2014 Supp. 44-534a.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Steven J. Howard dated July 9, 2015, is affirmed with regard to the injury to claimant's right hip, but reversed with regard to the left shoulder.

IT IS SO ORDERED.

Dated this _____ day of September, 2015.

HONORABLE GARY M. KORTE
BOARD MEMBER

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Steven J. Howard, Administrative Law Judge